IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.2410 OF 2004
IN
WRIT PETITION NO.4404 OF 1991

Kantilal Ochavdas Patel & Ors. ... Appellants

Vs.

Mohamad Hajiali Nirman ... Respondent

Mr. Mohan Pungalia for the appellants.

Mr. Girish Godbole for the respondent.

CORAM: SMT. RANJANA DESAI, J.

DATED: 14TH MARCH, 2005.

P.C.:-

1. In this civil application, it is prayed that the order of dismissal of the instant writ petition passed on 10/8/2004 by this court be set aside and the writ petition be restored to file.

2. I have heard Mr. Pungalia, the learned counsel appearing for the applicants. He contended that the writ petition came up on board on 9/8/2004. However, his clerk failed to notice the said matter and, therefore, he could not remain present in the court. It was only when an enquiry was made in the office on 17/9/2004, as to why the above petition is not being placed for hearing, his clerk came to know that the writ petition came to be dismissed for default on 9/8/2004. Therefore, on 17/9/2004, an application was made praying that the order

of dismissal be set aside and the application was filed on 20/9/2004. The learned counsel contended that the petition was dismissed for default not on account of any negligence or carelessness either of the applicants or of their advocate. It is because the clerk failed to notice the writ petition on board that the writ petition came to be dismissed. He submitted that when the matter was mentioned in this court on 17/12/2004, the applicants' advocates came to know that the respondent had already executed the decree on 16/12/2004. He submitted that in the peculiar facts and circumstances of the case, this writ petition may be restored.

3. I have also heard Mr. Godbole, the learned counsel appearing for the respondent. Mr. Godbole contended that the decree has been executed and, in fact, the respondent has taken possession of the suit premises. He contended that while handing over the possession, the applicants have taken a sum of Rs.55,000/- being the value of the articles which were in the suit premises. He drew my attention to the receipt dated 16/12/2004, which is signed by the applicants. He, therefore, submitted that the decree having been executed, the petition may not be restored. In the circumstances of the case, in my opinion, in the interest of justice, writ petition needs to be restored. However, considering the fact that the decree has been executed and the money has been accepted by the applicants being the value of articles lying in the suit premises, the respondent cannot be asked to hand over the possession to the

applicants. Mr. Pungalia, the learned counsel for the applicants says that the writ petition may be restored to the file and the possession of the suit premises may presently remain with the respondent. He also contended that the possession of the suit premises would obviously abide by the final order, which will be passed in this writ petition.

4. Mr. Godbole, contended that in case, this court desires to restore the writ petition, the applicants/petitioners may be asked to withdraw all the allegations which they have made in the civil application and in the affidavit in rejoinder, against the respondent and his sons and the respondent may be permitted to agitate the grievances made by him in his affidavit in reply at the time of hearing of writ petition. I see no difficulty in accepting the submission of Mr. Godbole.

Hence, the following order.

5. Writ Petition No.4404 of 1991 is restored to the file. Since the impugned decree has been executed and the respondent is in possession of the suit premises, the possession of the respondent shall not be disturbed. Mr. Pungalia, the learned counsel for the applicants states that the applicants are withdrawing all the allegations made against the respondent and his sons in the instant civil application and in the affidavit in rejoinder thereof. That statement is recorded. The respondent will be at liberty to agitate all the grievances which he has made in his affidavit in reply to the instant civil

application at the stage of final hearing of the writ petition. Needless to say that the possession of the suit premises will abide by the final order, which will be passed in this writ petition.

6. Civil application is disposed of in the aforestated terms.

(SMT. RANJANA DESAI, J.)